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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 435

HARRY LEV,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

REPLY BRIEF FOR PETITIONER.

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PRELIMINARY STATEMENT.

The government's brief raises questions as to the constitutionality of Title 18, Section 3500. In addition it completely overlooks the fact that the court below found that the trial court *was guilty of error on* both points relied on here by the petitioner. *U. S.* v. *Lev* (1958) (2nd Cir.) 258 F. 2d 9, 11, 13. Petitioner is, of course, in complete agreement with this finding but disagrees with the further finding of the court below, presumably pursuant to Rule 52, Fed. Rules, Crim. Proc., that both of these errors were harmless.

The questions to be determined here are whether or not these admitted errors were prejudicial to petitioner and in conflict with decisions of this Court. The refusal of the government to face up to this reality has led it to submit a brief in opposition which is completely unresponsive to the issues raised by petitioner.

I.

THE GOVERNMENT'S ARGUMENT THAT THE INSTRUCTIONS OF THE TRIAL COURT WERE PROPER AND THUS PROTECTED PETITIONER FROM THE IMPACT OF THE VARIANCE IS IRRELEVANT.

The government's sole answer to petitioner's contention that he was prejudiced by the variance is that the trial court's instructions were proper (Gov't. Bf. pp. 19, 20). Assuming *arguendo*, that this were a true statement, it hardly constitutes an answer to the asserted conflict between the court below and this Court in *Kotteakos* v. *U. S.* (1946) 328 U. S., 750 and *Paoli* v. *U. S.* (1957) 352 U. S. 232.

In the first place, *Kotteakos* establishes that a variance between a charge of one conspiracy and proof of more is error. This Court warned that such error may be prejudicial even if admonitory instructions are given. Thus, the correct test of prejudicial error even in the face of proper instructions was stated by this Court as follows: (p. 764)

> "It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own in the total setting. * * *
>
> "This must take account of what the error meant to them not singled out and standing alone, but in

relation to all else that happened. Any one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record."

Here "the thing done wrong" was permitting the jury to hear the immensely prejudicial testimony relating to the Bonita conspiracy (Pet. Br. pp. 7, 8, 16) in which petitioner concededly was not involved. *Kotteakos* recognizes that while instructions may be designed to keep "separate transactions separate", the error is nevertheless prejudicial where, as here, a defendant is connected with only a few of so many distinct transactions.

Paoli carries *Kotteakos* logically forward. It holds that even in a *one conspiracy case* (where there is no question of variance) admonitory instructions are not enough to protect a defendant from evidence admissible only against a co-conspirator where the case is complicated. Indeed, a most respectable minority of this Court, as pointed out in petitioner's opening brief (pp. 17-19), would extend the rule to cases much less complicated than the one at bar.

It is thus quite apparent that the government's argument as to the protection afforded petitioner by the cautionary instructions is utterly irrelevant, since *Paoli* holds that under these circumstances no instructions can be adequate.

Finally, petitioner's argument that *Kotteakos* demands a "painstaking examination" (p. 771) of the entire trial record is answered by the government only in a footnote (Govt. Br. p. 20) that "obviously" the court below did so. Petitioner respectfully submits that the opinion below,

258 F. 2d 9, 11, indicates that the precise opposite occurred and that the materiality of the variance was determined solely upon the findings that the offenses might have been joined and that the instructions were adequate to protect petitioner.*

II.

TITLE 18, SECTION 3500, IS UNCONSTITUTIONAL. EVEN IF IT WERE CONSTITUTIONAL, THE CARLIN STATEMENT IS STILL DISCOVERABLE TO PETITIONER.

The government contends that the *in camera* examination by the Court below of a statement *de hors* the record was proper. The only justification it advances in support of this is that Title 18, Sec. 3500(c) permits a Court of Appeals to re-examine such statements after they have been considered by the trial court on objections by the government and are part of the record on appeal. (Gov't. Bf. pp. 27, 28).

The mere statement of this argument demonstrates how hard put the government is in defending this absolutely improper practice and makes evident the necessity for the exercise of the supervision of this Court.

Furthermore, the government argues that such *in camera* inspections amount to due process since *Jencks* v. *U. S.* (1957) 353 U. S. 657 promulgated only a rule of evidence. Petitioner disagrees with these contentions and there is thus here raised a question as to whether Title 18, Section 3500 is constitutional at all. This question

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* A more careful reading of petitioner's brief (p. 12, 13) will show that petitioner has always so contended and the government's statement (footnote p. 20) as to petitioner's arguments is clearly wrong (footnone, Gov't. Bf. p. 20)

is of such prime importance to the administration of criminal law in the Courts of the United States that this Court should here decide it once and for all.

In *Jencks*, this court unanimously decided that a defendant was entitled to the production of statements and reports made to government agents by witnesses when those reports bore upon the subject of their testimony. The only difference between the majority and minority arose out of a difference of opinion as to who should in the first instance examine such reports to determine their relevency—the defense or the trial court. The majority decided in favor of the former, stating p. 668:

> "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" (Emphasis supplied.)

The language of this Court makes clear that it intended by its decision to hold that due process under the Fifth Amendment required such examination. If so, Title 18, Sec. 3500 is unconstitutional since it deprives a defendant of that right. Accordingly, the reliance of the court below on that statute is error and in conflict with *Jencks*.

Petitioner also suggests that Title 18, Sec. 3500 is unconstitutional because it establishes a rule of procedure and is therefore in contravention of Article III of the Constitution vesting power in this Court.*

In addition, the government contends that the Carlin Statement is not within the ambit of Title 18, Sec. 3500. In this connection it is pointed out that the

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* For further development of this suggestion see Vol. VII, No. 2, Catholic University Law Review, p. 91, "Jinks and Jencks", by Arthur John Keefe.

court below held that it was error under *Jencks* to deny petitioner the right of inspection of this document. The seriousness of this admitted error is highlighted by the fact that neither the government in its brief here nor the court below (both of which have examined the statement) make any claim that it does not contain matter relevant to the subject matter of his examination. Nor is any assertion made that the statement is privileged against disclosure on the grounds of national security, its confidential character, public interest or otherwise.

Heretofore, petitioner contended that the Carlin statement is within the compass of Title 18, Sec. 3500. (Ptr's. Bf. pp. 27-29). The government's argument raises the question as to how this is to be determined. It seems evident that a summary of what a witness has said may often include a "substantial verbatim recital." Should not this fact be determined by permitting a full examination of the witness and the person preparing the statement? Does not due process require such procedure? These questions have arisen in the trial courts and are bound to arise again and again in the future. This Court should determine them in the interests of orderly procedure in the Courts of the United States.

The government's reliance on *United States* v. *Palermo* (1958) (2nd Cir.) 258 F. 2d 397, as to what is or is not a statement, is a classic example of lifting by one's own boot straps since that decision is by the same court which is sought to be reviewed here. The best that can be said of it is that the court below is consistent, even if wrong. The *Scales* case also relied upon by the government is completely inapposite since it does not reach the question at all.

Finally, it is pointed out that, unfortunately, the government has not seen fit to respond to petitioner's argument that even if, *arguendo*, the statement were not discoverable under Title 18, Sec. 3500, it is still available under *Jencks* or other rules of discovery and evidence. The reliance in *Jencks* by this Court on *United States* v. *Burr* (C.C. Va.) F. Case No. 14694, p. 187, strengthens this interpretation as does its statement, p. 667:

> "For production purposes, it need only appear that the evidence is relevant, competent and outside of any exclusion rule * * * 344 U. S. at 420."

CONCLUSION.

It is believed that it has been demonstrated that the arguments of the government are unsound and unresponsive and fail to support its position. Further, it is pointed out that the hurried attempted by Congress to overcome this Court's decision in *Jencks* v. *United States* (1957), 353 U. S. 657 by the enactment of Title 18, Section 3500 has resulted in confusion and chaos in the trial courts of the United States. A large number of cases presently pend before this Court because of varied interpretations of it. Is the statute constitutional at all? It is respectfully submitted that these matters are so important as to require a final determination of them by the Court.

Respectfully submitted,

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